

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

DECISION AND ORDER

06-CR-6174L  
09-CV-6123L

v.

HAROLD JASPER,

Defendant.

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Defendant, Harold Jasper (“Jasper”), was sentenced principally to a term of 60 months imprisonment on March 5, 2008, based on his guilty plea pursuant to a written plea agreement. The statute and the plea agreement provided that Jasper was subject to a minimum term of imprisonment of 60 months with a maximum possible sentence of 40 years. Although the United States Sentencing Guidelines (“USSG”) range provided for a sentence of 60-71 months, the Court imposed the minimum sentence of 60 months.

Defendant did not appeal that Judgment and Conviction, although he did move for a sentence reduction, pursuant to 18 U.S.C. § 3582 based a retroactive application of the USSG for crack cocaine offenses. This Court, however, denied that application because Jasper’s sentence was the result of the statutory minimum sentence and not based on an application of the USSG. That order was entered October 8, 2009.

Now pending before the Court is Jasper's motion to vacate or set aside the conviction pursuant to 28 U.S.C. § 2255 (Dkt. #48). The only ground advanced in that petition is Jasper's claim that his trial counsel provided ineffective assistance of counsel for not seeking at trial a sentence below 60 months because of the amendments to the USSG crack cocaine.

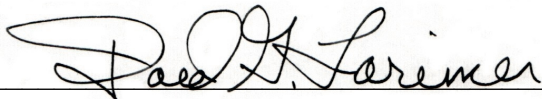
The petition must be dismissed. Jasper has failed to demonstrate that the representation by his trial counsel was deficient and that the alleged deficiency caused substantial prejudice to him. In fact, counsel's advice was correct: the Court could not reduce Jasper's sentence below the statutory minimum of 60 months. The USSG do not affect Jasper's sentence here because the sentence is controlled not by the USSG but by the statutory minimum.

#### CONCLUSION

The motion of Harold Jasper to vacate his conviction (Dkt. #48) is in all respects denied, and the petition is dismissed.

I decline to issue a certificate of appealability because Jasper has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

  
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DAVID G. LARIMER  
United States District Judge

Dated: Rochester, New York  
October 9, 2009.